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VOTING RIGHTS LAW AND POLICY IN TRANSITION

Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer*

The Voting Rights Amendment Act¹ (VRAA), recently introduced in the House by Representatives Sensenbrenner and Conyers and in the Senate by Senator Leahy is a valiant effort to save the Voting Rights Act² (VRA), an iconic statute that many of us have called a superstatute.³ The VRAA is a response to the Supreme Court's decision in *Shelby County v. Holder*,⁴ which struck down section 4(a) of the VRA, the provision that identified the jurisdictions that needed to submit or preclear their proposed changes prior to implementation, under section 5 of the Act, to the Department of Justice or the United States District Court for the District of Columbia.

But even assuming that the bill becomes law, the VRA as amended by the VRAA will at best be a pale shadow of its former self. Sections 4(a) and 5 of the VRA, prior to the Court's decision in *Shelby County*, applied, in whole or in part, to fifteen states. The VRAA proposes a new coverage formula, which applies to states that have "persistent [and] extremely low minority turnout" and have committed five voting rights violations in a fifteen-year period.⁵ Under this new formula the VRAA would apply to four states: Georgia, Louisiana, Mississippi, and Texas. This is the most that the Democrats in Congress believe that they can get the Republicans to agree on and it is uncertain — and many are skeptical — that this bill can become law.

Unfortunately, the VRAA attempts to capture, as much as possible, the regulatory framework that was in place for the latter part of the twentieth century. If the VRAA will become law, recapturing some elements of the past seems to be the only point of bipartisan agreement. The VRAA does not even begin to capture the voting problems of today — such as photo voter identification requirements, which are explicitly exempted from the VRAA.

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¹ S. 1945, 113th Cong. (2014), available at <https://www.govtrack.us/congress/bills/113/s1945/text>, archived at <http://perma.cc/K67T-GT8A>.

² 42 U.S.C. §§ 1973 to 1973bb-1 (2006 & Supp. V 2011).

³ See, e.g., Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. (forthcoming 2014).

⁴ 133 S. Ct. 2612 (2013).

⁵ S. 1945 § 3(a)(1).

In addition, in at least one respect, the VRAA is a step backwards. It compels supporters of voting rights to file suit against the states and litigate extensively in order to show that a voting rights violation has occurred. This is one reason that some civil rights groups have expressed misgivings about the VRAA, notwithstanding the extreme pressure for all groups to support the Amendment. Moreover, as Professor Ellen Katz argues in her commentary in this Forum, the VRAA is vulnerable under the Court's *Boerne* doctrine in a way that the VRA never was.⁶

Perhaps more importantly, the VRAA does not have much to say about looming voting rights issues such as proof-of-citizenship requirements. Consider this question in greater detail. In a recent decision, the U.S. District Court for the District of Kansas ruled that the Election Assistance Commission (EAC) does not have the statutory authority to preclude the States of Arizona and Kansas from demanding that voters interested in registering to vote in federal elections, through the National Voter Registration Act, prove that they are citizens of the United States.⁷ The court ordered the EAC to immediately modify the federal voter registration form to include the proof-of-citizenship language demanded by the states.⁸

As with many electoral rules, proof-of-citizenship requirements have a disproportionate impact on some identifiable groups of voters. In this case, the voters most likely to be impacted are poor voters and voters of color. By some accounts, more than 10,000 voters in Kansas have been unable to vote because they have not been able to provide proof of citizenship.⁹ Similarly, when Arizona enacted its proof-of-citizenship requirement, tens of thousands of voters (by one account over 30,000) were unable to vote, notwithstanding the fact that the vast majority of the affected voters were United States citizens.¹⁰ Among the group of voters that was disproportionately impacted by Arizona's proof-of-citizenship requirement, Latino voters, not surpris-

⁶ Ellen D. Katz, *Dismissing Deterrence*, 127 HARV. L. REV. 248 (2014).

⁷ *Kobach v. EAC*, No. 13-cv-4095-EFM-TJJ, 2014 WL 1094957, at *1 (D. Kan. Mar. 19, 2014), available at https://ecf.ksd.uscourts.gov/cgi-bin/show_public_doc?2013cv4095-157, archived at <http://perma.cc/X2MT-BHHY>.

⁸ *Id.*

⁹ See, e.g., John Hanna, *Judge orders election agency to help enforce proof-of-citizenship laws in Kansas, Arizona*, WASH. POST, Mar. 19, 2014, http://www.washingtonpost.com/politics/judge-orders-election-agency-to-help-enforce-proof-of-citizenship-laws-in-kansas-arizona/2014/03/19/eradb826-afa2-11e3-9627-c65021d6d572_story.html, archived at <http://perma.cc/F2BQ-SVUZ>.

¹⁰ See *Appeals Court Upholds Arizona's Voter ID Requirement*, FOX NEWS, Apr. 17, 2012, <http://www.foxnews.com/politics/2012/04/17/appeals-court-upholds-arizona-voter-id-requirement>, archived at <http://perma.cc/WD8Q-2TZ3> ("Opponents of the law argued that at least 30,000 potential voters have been excluded from voting in Arizona because they failed to provide other documents required by the state, even though there was no evidence they weren't eligible to vote.").

ingly, were overrepresented.¹¹ Latino voters have some of the lowest registration rates in many parts of the country, including Arizona, where only about forty-four percent of Latino citizens are registered as compared to over sixty-eight percent registration rate for white voters.¹²

In many respects, proof of citizenship is the new voter identification requirement. Just as many state legislatures that were controlled by the Republican Party started implementing rules requiring photo voter identification — in fact, the only states that have implemented voter photo identification requirements have been those controlled by the Republican Party — we are likely to see a new wave of proof-of-citizenship requirements sweep across the country, in those legislatures that are Republican-controlled. Georgia has already requested that the EAC modify the federal voter registration form to reflect the fact that Georgia requires its voters to produce proof of citizenship.¹³

But the VRAA has nothing to say about these issues. Though the VRAA may be the best offer on the table and though its purpose is laudable, it is at best an extremely modest statute.

In this respect, it is worth drawing attention to the fact that the original Voting Rights Act was an unusual statute. The Voting Rights Act of 1965, hard fought as it was and even though it dragged the Democratic Party in the South kicking and screaming into the twentieth century, represented a legal and public policy consensus on the need to eradicate first-generation barriers to racial equality in voting. In *South Carolina v. Katzenbach*,¹⁴ Chief Justice Warren referred to the legislation as “stringent,”¹⁵ “inventive”¹⁶ and “uncommon.”¹⁷ The Act posed a “basic” constitutional question: “has Congress exercised its powers under the Fifteenth Amendment in an appropriate manner with relation to the States?”¹⁸ This meant, he continued, that “[a]s against the reserved powers of the States, Congress may use any ra-

¹¹ ADVANCEMENT PROJECT, SEGREGATING AMERICAN CITIZENSHIP I (2012), *available at* <http://www.advancementproject.org/page/-/resources/Latino%20Report%202012.pdf>, *archived at* <http://perma.cc/4LNA-O3BL>.

¹² U.S. CENSUS BUREAU, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 2010, at tbl 4b, *available at* http://www.census.gov/hhes/www/socdemo/voting/publications/p20/2010/Table4b_2010.xls, *archived at* <http://perma.cc/XZ2A-6TN3>.

¹³ Roxana Hegeman, *Feds Deny State Bids to Tighten Voter Registration*, ABC NEWS, Jan. 18, 2014, <http://abcnews.go.com/m/story?id=21584892&sid=81>, *archived at* <http://perma.cc/J3WS-ACJT>.

¹⁴ 383 U.S. 301 (1966).

¹⁵ *Id.* at 308.

¹⁶ *Id.* at 327.

¹⁷ *Id.* at 334.

¹⁸ *Id.* at 324.

tional means to effectuate the constitutional prohibition of racial discrimination in voting.”¹⁹

The Act was unusual not simply because it was “inventive” or “uncommon.” It was unusual because it gave rise to and then reflected a broad consensus with respect to the need to eliminate racial discrimination in voting. In *Katzenbach*, the Court aligned itself with that consensus while at the same time legitimating the VRA. Under *Katzenbach*, the VRA would remain in good constitutional standing for only as long as the justices understood American society as rife with racism.

Fast-forward to the recent *Shelby County* case. The majority opinion in *Shelby County* essentially declared that the work of the VRA, eliminating racial barriers to voting by the states, has essentially been completed. Consequently, the Court did not think that Congress could justify the then-existing formula in light of current circumstances. The *Shelby County* opinion is best understood as a policy document — arguably, no more or less of a policy statement than *Katzenbach* — a statement by the conservative majority on the Court that it disagrees with Congress about the nature and scope of voting rights law.

The question is: Where should voting rights law and policy proceed from here? On a first pass, this is an easy question to answer, as there is no shortage of suggestions for a new coverage formula and possible directions for voting rights policy. The task is simply to choose among the various offerings. More poignantly, the VRAA, the current offer on the table, reflects a choice and the likely direction of the near future.

But upon deeper examination, it is likely the case that a new consensus over the future of voting rights policy will elude us for a very long time. Voting rights policy is in a moment of transition and there is currently no consensus in the political process on how to move voting rights policy forward. Voting rights law and policy are currently caught between two different ideological visions. For some, law and policy, including constitutional law, ought to remove all barriers that impose any significant or meaningful burden on the right to vote. For others, states have the power and the responsibility to enact voting laws to assure that only legitimate voters participate in the political process. These positions are both ideological and partisan. Conservatives and Republicans tend to favor state laws ensuring the responsible exercise of the right to vote. Liberals and Democrats tend to favor laws that maximize political participation and self-government. Voting rights law and policy are caught between both visions.

This ideological and partisan divide is one reason that Congress has proven, so far, to be incapable of responding to *Shelby County*.

¹⁹ *Id.*

Congress could have greeted the Court's decision in *Shelby County* with disdain because the Court struck down an act of Congress, a co-equal branch. *Shelby County* could have reasonably been viewed as a symbol of a showdown between Congress and the Court about a major public policy initiative.

But the institutional lens is neither the most compelling explanatory variable for the Court's decision in *Shelby County* nor does it explain Congress's response to *Shelby County*. The Court's decision is best understood not in institutional terms, but in ideological terms. Congress's putative response, in the form of the VRAA, is also best understood in partisan and ideological terms. *Shelby County* tapped into the ideological and partisan divide that currently exists in voting rights law and policy.

To the extent that the VRAA is weak and anemic, as Professor Katz intimates,²⁰ the VRAA's weakness is a reflection of both the constraint imposed by the Court in *Shelby County* — the need to update the coverage formula to reflect current circumstances — and the partisan divide — making voting as easy as possible as against assuring that voting is exercised responsibly by eligible citizens. The VRAA is an attempt to craft a bipartisan compromise that fits narrowly between both positions.

In our view, voting rights activists ought not settle for the valiant but modest effort that is the VRAA. An extremely narrow, modest, and constitutionally vulnerable statute, born of the supposed need for political compromise, is not worth fighting for. Rather, civil rights activists should engage the political process to build a new vision that encompasses racial equality in voting. What is needed is a new voting rights movement that takes as its goal the need to build a consensus over broad universal political participation. This new consensus will have to be, necessarily, forged along ideological and maybe even partisan lines. Eventually, one view will prevail.

In North Carolina, as a consequence of laws passed by the state that limit voting rights, citizens have started to build such a grassroots movement. They call it Moral Mondays. The movement has spread from North Carolina to Georgia and South Carolina.²¹ The Moral Mondays movement may ultimately fizzle out. But the movement is an example of the type of political and social movement that ought to capture the attention of voting rights activists.

²⁰ See Katz, *supra* note 6, at 250–51.

²¹ See generally Herbert Buchsbaum, *Budding Liberal Protest Movements Begin to Take Root in South*, N.Y. TIMES, Mar. 18, 2014, <http://www.nytimes.com/2014/03/19/us/protest-disrupts-georgia-senate-session-on-bill-to-block-medicare-expansion.html>, archived at <http://perma.cc/R2V7-VZDZ>.

The VRAA is but a temporary way station. It need not be the final destination for voting rights policy. Voting rights activists ought to strive to build consensus in favor of broad participation rights by citizens. Such a movement would be a worthy heir to the majestic Voting Rights Act of 1965.